Editor's note: 84 I.D. 276

MABLE M. FARLOW

IBLA 75-523 Decided June 7, 1977

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Set aside and hearing ordered.

1. Boundaries -- Patents of Public Lands: Generally -- Public Lands: Riparian Rights -- Surveys of Public Lands: Generally

   In determining what land is conveyed under patents or grants of public land bordering a meandered watercourse, the general rule is that the waterline itself, not the meander line, constitutes the boundary. There is an exception where the meander line may constitute the boundary between lands omitted from the survey and the watercourse if fraud or gross error is shown in the survey. This exception is only applicable to limit the boundary of the surveyed lots on the side of the watercourse where the omitted land is shown. It does not apply to a lot on the opposite side of the watercourse from the omitted land so as to pass title to the omitted land with title to the lot on the opposite side. The waterline would remain the actual boundary of that lot.

2. Color or Claim of Title: Generally

A claim or color of title must be based on a document or documents, from a source other than the United States, which on their face purport to convey title to the land applied for, but which is not good title. The mere mistaken belief that the land applied for was included in the description set forth in the claimant's deed is insufficient to establish a claim or color of title.

3. Boundaries -- Conveyances: Generally -- Evidence: Generally -- Color or Claim of Title: Description of Land

Extrinsic evidence may be used to make definite the description in a private deed which contains a latent ambiguity, either to determine actual or color of title. Therefore, a color of title claimant may introduce extrinsic evidence to establish whether the deeds in her chain of title were based upon plats, records and other documents which can be read together with the deeds as creating a color of title beyond the actual title shown on an official federal survey plat.

4. Color or Claim of Title: Good Faith

The requirement of good faith contained in the Color of Title Act necessitates establishing the 20-year period of possession under claim or color of title prior to the time the claimant learned of the defect in her purported title. If this requires counting years during which the claimant's predecessors in interest held the land, their good faith must also be established.

5. Color or Claim of Title: Generally -- Rules of Practice: Appeals: Hearings

The obligation for proving a valid color of title claim is upon the claimant. Where a claimant has alleged facts which, if proven, may establish her color of title, the Board of Land Appeals may order a fact-finding hearing pursuant to 43 CFR 4.415.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau & Karnopp, Bend, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Mable M. Farlow appeals from the April 14, 1975, decision of the Oregon State Office, Bureau of Land Management (BLM), rejecting her application OR-12944 under the Color of Title Act, Dec. 22, 1928 (45 Stat. 1069), as amended, 43 U.S.C. § 1068 et seq. (1970). Appellant filed her application on June 27, 1974, for certain land west of the Deschutes River in sec. 12, T. 6 S., R. 13 E., W.M., Wasco County, Oregon. The State Office rejected the application because appellant's chain of title lacked a deed or other written instrument describing land west of the Deschutes River.

Appellant's chain of title begins with a patent issued in 1904 by the United States for land described as "Lots numbered three, four and five" in section 12, "according to the 'Official Plat of the Survey.'" The "Official Plat of the Survey," approved in 1883, places these lots between the east township boundary and the Deschutes River. As shown on that plat, lot 5 contains all the land in the S 1/2 SE 1/4 of section 12 and east of the river, amounting to 30.96 acres. The land in the S 1/2 SE 1/4 which is west of the river is designated lot 6. Lot 6 has never been patented.

There have been numerous conveyances of the patented parcel since 1904. Warranty deeds for six conveyances during 1927-1943 all describe the conveyed land as lots 3, 4 and 5. In 1946, appellant and her husband (now deceased) purchased for $50 land described as: "Lot Five (5), * * * containing 30 acres more or less. All mineral (perlite) rights retained on any part or parcel of above land which lays on East side of the Deschutes River."

This case arose because the 1882 survey, on which the 1883 official survey plat was based, erroneously meandered the Deschutes River as flowing through the approximate center of the S 1/2 SE 1/4 of section 12. By lot 5, the river actually curves and flows closer to the east township boundary. A 1972-73 dependent resurvey established new meanders of the river and subdivided the omitted lands in section 12 which are west of the river. The approved plat of this subdivisional survey shows two lots in the S 1/2 SE 1/4 west of the river: lot 7, in the SW 1/4 SE 1/4, and lot 8, in the SE 1/4 SE 1/4 bounding the river. The position of patented lot 5 is also shown in the SE 1/4 SE 1/4 but east of the river and is much smaller than shown on the 1883 survey plat.

Appellant has applied for the land, shown in the resurvey as within lot 8, which is east of the 1883 meander line of the Deschutes River, but actually west of the river. The State Office, in rejecting her application, stated that no conveyance in appellant's chain

of title described land west of the river. According to the State Office, the term "lot 5" only describes land east of the river.

Appellant contends generally that her chain of title gives color of title to the land west of the river because all of the public records show lot 5 as including land on both sides of the river with the exception of the erroneous 1883 survey plat. She also contends that the meander line shown on the 1883 survey plat is the boundary of lot 5. This would include land west of the river.

[1] If appellant is contending alternatively that she has actual title to the land west of the river up to the meander line as shown on the erroneous 1883 survey plat, we must reject this argument. The general rule is that survey meanders of rivers are run for the purpose of defining the sinuosities of the banks of the watercourse and to determine acreage, but they are not boundaries of the tract. The watercourse, not the meander line as actually run on the land, is the boundary of federal conveyances. E.g., United States v. Lane, 260 U.S. 662 (1923); Railroad Company v. Schurmeir, 74 U.S. 272, 286-87 (1868). An exception to this rule has been created where fraud or gross error is shown in the survey or where facts and circumstances disclose an intention to limit a grant or conveyance to the meander line. In such situations, the meander line, not the watercourse, is considered to be the boundary

of the federal conveyance. E.g., Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561 (1923); Lee Wilson & Co. v. United States, 245 U.S. 24, 29 (1917); Ritter v. Morton, 513 F.2d 942, 947 (9th Cir.), cert. denied, Ritter v. Kleppe, 423 U.S. 947 (1975); Utah Power and Light Co., 6 IBLA 79, 86-87, 79 I.D. 397, 400 (1972).

The above cases applying the exception to the watercourse boundary rule, however, all refer to situations where there is omitted land between the meander line on one side of the watercourse and the watercourse. Thus, that rule would be applicable to the original lot 6 which is shown on the 1883 survey plat as being bounded on its east side by the river. The omitted lands between the meander line boundary of lot 6 and the river may be surveyed as public lands. This was done by the 1973 resurvey. We know of no case holding that the meander line of an erroneous survey may be considered the boundary of a lot shown as being on one side of the watercourse so as to include land on the other side of the watercourse. In other words, where there has been an error in a survey such as in this case, the general rule that the watercourse is the boundary of lots shown as bounded by the watercourse on the erroneous survey plat is applicable to the side of the watercourse where there have not been omitted lands. However, the exception is applicable to the lots on the other side of the watercourse where there are omitted lands. The public land survey system uses fractional subdivisions designated by individual lot numbers to describe land on each side of a meandered

river. It is basic in that system that a given lot is only on one side of the meandered watercourse. See MANUAL OF SURVEYING INSTRUCTIONS, General Land Office, pp. 74-75, Plate III (1902); MANUAL OF SURVEYING INSTRUCTIONS, U.S. Department of the Interior, pp. 83, 86 (1973). Therefore, conveyance of a lot described according to the official survey plat and shown on that plat as bounded by a river does not give actual title to land on the other side of the river. See William F. Trachte, A-29260 (June 7, 1963). The land west of the river is public land subject to a color of title application.

[2] The crucial issue in this case is whether the conveyances in appellant's chain of title may be deemed to give color of title to land west of the river within the meaning of the Color of Title Act. The BLM State Office correctly stated in its decision the principle that a claim or color of title must be based on a document or documents, from a source other than the United States, which purport to convey title to the land applied for, but which is not good title. Cloyd and Velma Mitchell, 22 IBLA 299, 303 (1975); William P. Surman, Mary Van Anderson Surman, 18 IBLA 141, 143 (1974). The mistaken belief that the land applied for was included in the description set forth in the claimant's deed is insufficient to establish a claim or color title. Cloyd and Velma Mitchell, supra at 302; William P. Surman, Mary Van Anderson Surman, supra at 144; Marcus Rudnick and Marcia Rudnick, 8 IBLA 65 (1972); Storm Brothers, A-29023 (October 8, 1962).

[3] We have indicated why the description in appellant's deeds cannot give actual title to the land. Without more, those descriptions also would not be considered as giving color of title to the land where reference would be made to the original United States plat of survey showing lot 5 to be on one side of the river. However, appellant urges, in effect, that the descriptions in the chain of title are not based upon the 1883 survey plat but on other plats, public records, title company records and opinions reflecting a different lot 5 which embraces land on both sides of the river. She contends that evidence outside the deed should be considered to ascertain the identity of the property described as lot 5.

In support of this position, she submits the following documents to the Board: (1) an affidavit of Clarence N. Hunt, who purchased lots 3, 4 and 5 in 1943 and sold lot 5 to appellant, stating that he always believed lot 5 was located on both sides of the river and relied on other documents for such a belief; (2) a 1916 right-of-way and track map of the Deschutes Railroad Company, corrected to December 31, 1933, showing lot 5 on both sides of the river; (3) an undated but post-1965 Wasco County assessor's map showing lot 5 on both sides of the river; (4) a second assessor's map, noted "retraced June 5, 1975," still showing lot 5 on both sides of the river; (5) copies of the Wasco County tax rolls from 1947 through 1964 indicating lot 5 consists of 29.76 acres; and (6) an affidavit of Pat McLoughlin, manager and general partner of Wasco Title Oregon,

Ltd., a title insurance company, stating that for at least 50 years maps of the Wasco County assessor's office, "and other public records," have shown lot 5 on both sides of the river. These documents go far to lend support to appellant's contentions that she and her predecessors considered the conveyances of lot 5 to embrace land west of the river as well as east of the river because there was reliance on records other than the 1883 survey plat.

It is true, as appellant contends, that to ascertain the exact location of property described in deeds, especially where only lot numbers are given, it may be necessary to look to other records, such as survey or other plats. Thus, we have looked to the 1883 United States survey plat here to ascertain the true legal boundary of lot 5. The issue thus becomes whether we can look to other evidence of plats, records, etc., to establish a color of title to land different from what the official United States survey would show as actual title.

Prior departmental decisions which held that a description in a deed could not give color of title to land beyond the actual boundaries created by the United States survey were not concerned with the type of evidence presented in this case. See, e.g., Cloyd and Velma Mitchell, supra; William P. Surman, Mary Van Anderson Surman, supra; Marcus Rudnick and Marcia Rudnick, supra; Storm Brothers, supra. Those cases, therefore, are not precedents precluding a consideration

of evidence which goes to an understanding of the descriptive words used in a deed. Rather, they are concerned with an unsupported mistaken belief that a description included the subject land.

It is a general principle of evidence and property law that extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity, either to determine actual title or color of title. Richardson v. Duggar, 86 N.M. 494, 525 P.2d 854 (1974); Redfearn v. Kuhia, 50 Ha. 77, 431 P.2d 945 (1967); 3 Am. Jur. 2d Adverse Possession, § 108 (1965); 23 Am. Jr. 2d Deeds, § 222 (1965); 3 Jones on Evidence, § 16.50 (6th ed. 1972). Where a latent ambiguity exists in the chain of title, such evidence may be submitted with a color of title application to make definite the description by establishing what the parties to a conveyance meant by the language set forth in the conveying documents. See Hugh Manning, A-28383 (August 18, 1960). In the circumstances here there is an ambiguity as to whether the deeds of conveyance were intended to convey only the lots as shown on the 1883 United States survey plat or whether they were intended to convey the lots as shown on some other plats and records. We conclude that evidence to resolve that ambiguity should be considered to determine whether the deeds were based upon such other plats and records which should be read together with the deeds as creating a color of title to land west of the river.

[4] For a class 1 claim under the Color of Title Act, a claimant must have held the land in "good faith" under color of title for 20 years and have cultivated a portion of the land or have improvements on the land. 43 U.S.C. § 1068 (1970); 43 CFR 2540.0-5(b). There is not good faith within the meaning of the Act where the claimant knew at the time he acquired the land that title was in the United States. Day v. Hickel, 481 F.2d 473, 476 (9th Cir. 1973). Good faith also requires that the 20-year period of possession under claim or color of title must be established prior to the time the claimant learned of the defect in his purported title. If this necessitates counting years during which the claimant's predecessors in interest possessed the land, their good faith must also be established. Lester J. Hamel, 74 I.D. 125, 129 (1967); Nora B. K. Howerton, 71 I.D. 429, 434 (1964). If any predecessor knew of the defect, the 20 years must be established after he divested himself of the land. See Bryan N. Johnson, 15 IBLA 19, 22 (1974).

Appellant and her husband learned of their defective title in 1961 during a lawsuit brought by their grantor to cancel the 1946 deed. Also in 1961, appellant's husband applied for a grazing lease on the lands from the United States. Therefore, appellant's 20-year period of good faith possession must pre-date 1961 and must include the conveyances of March 25, 1939, and June 30, 1943. Those conveyances were for the three lots. It was not until 1946 that

lot 5 was severed from the entire parcel. From the charts, plats and maps in the record it appears that the error in the placement of the river by the 1883 survey did not so greatly affect the total acreage of the three lots, which were all on the east side of the river. In comparison, the change in the river's location now shows the area shown on the 1883 plat as lots 3 and 4 to be much larger, with only lot 5 suffering a loss of acreage. We mention this because much has been made of the acreage discrepancy for lot 5 as shown in the conveyances and as actually exists as bounded on the west by the river. The question of good faith in the grantors and grantees in believing title included land west of the river will go to the conveyances of the three lots prior to 1946, as well as to the 1946 conveyance of lot 5.

[5] The obligation for proving a valid color of title claim is upon the claimant. 43 U.S.C. § 1068 (1970); see William F. Trachte, supra. Appellant has alleged facts which, if proved, may establish her color of title. We believe appellant should be afforded an opportunity to substantiate her claim further. This can best be done at a hearing where testimony, as well as documentary evidence, may be presented and explained and where BLM may present its own evidence, if it desires, and cross-examine appellant's witnesses. Therefore, we order a fact-finding hearing to be held before an Administrative Law Judge pursuant to 43 CFR 4.415. See Sun Studs, Inc., 27 IBLA 278, 294, 83 I.D. 518, 525-26 (1976). The issues at the hearing may

include all matters relevant to showing entitlement under the Color of Title Act and include: whether there is sufficient color of title to land west of the river from other records, plats, etc., as well as the deeds, as we have discussed above; if so, what land; whether appellant and her predecessors were in good faith in claiming land west of the river; and compliance with other requirements of the Act.

The ordering of the hearing does not prevent BLM and appellant from making any stipulated agreement which might obviate the necessity for a full hearing. In such an event, they may make appropriate motions for dismissal to the Administrative Law Judge assigned to hear the case for referral to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is referred to the Hearings Division for appropriate action.

Joan B. Thompson
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge